Supreme Court, U.S.
F I L E D
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1587

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BOBBY REED MAGBY,

Petitioner,

-vs-

DONALD WAWRZASZEK, and ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should this Court, once again, refuse to address the renewed voluntariness issue on the merits?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
ARGUMENT	
THERE ARE SEVERAL REASONS WHY THIS COURT SHOULD AGAIN DENY THE WRIT AND AGAIN DECLINE TO ADDRESS THE RENEWED VOLUNTARINESS ISSUE ON THE MERITS.	1
CONCLUSION	6

ARGUMENT

THERE ARE SEVERAL REASONS WHY THIS COURT SHOULD AGAIN DENY THE WRIT AND AGAIN DECLINE TO ADDRESS THE RENEWED VOLUNTARINESS ISSUE ON THE MERITS.

In his present petition, petitioner asks this Court to find his statements made to his probation officer involuntary -- the sole basis for this instant voluntariness issue is the alleged coercive atmosphere of the probationary setting. This Court has previously declined to address the merits of this voluntariness issue.

Long ago, in 1979, petitioner visited this Court with a similar petition, and this Court denied that petition. See this Court's cause number 79-690, with the denial occurring on January 7, 1980. That petition presented a number of issues, two of which are germane to the current proceeding. See 1979 petition at

pages 11-19. In 1979, petitioner argued that the error of admitting at trial his statements to the probation officer could not be considered harmless -- this "impossibility of harmless error" issue presumed the trial admission of the statements to be error on the sole basis that the probation officer failed to advise petitioner of his constitutional rights.

Petitioner also argued, in 1979, that wholly apart from the lack of a waiving of constitutional rights, the statements were involuntarily made due to the probationary relationship alone (the precise issue raised in the instant writ). Admittedly, the evidentiary hearing held on the federal level does provide a now more detailed factual backdrop; however, the total factual scenario is at odds with the slanted

factual presentation offered by petitioner in the present petition. See the district court's memorandum decision, attached to the instant writ, for a partial presentation of the more objective facts.

In any event, before the merits of the present voluntariness issue should be addressed by this Court (and by the state), petitioner appears to have a couple of hurdles to overcome. First, this Court has already seen fit not to consider this voluntariness issue on the merits. There seems to be nothing to alter this prior disposition -- this Court should again refuse to address the merits.

Second, and perhaps more persuasively, this Court has already seen fit not to consider the issue of an "impossibility of harmless error" on the merits.

Regardless of the precise nature of the error (a violation of the advisement of constitutional rights or statements involuntarily made due solely to the probationary relationship), the error remains harmless based on the other more damaging trial testimony elicited at petitioner's trial.

Because the courts have already concluded that the admission of petitioner's statements was harmless error, even if this Court were to conclude that the statements were involuntary, it would not result in a reversal of petitioner's conviction and thus would result in only a hollow victory. Seemingly, this Court has more pressing matters than to extend the courtesy of a hollow victory. Contrary to petitioner's view in the instant writ, this is not "that case" which this Court

has supposedly been waiting for in order to refine the law of the land.

By design, this response does not set forth an historical background. No factual concessions are intended -- it is respondents' position that a proper presentation of the facts shows that the statements are wholly voluntary. See the memorandum decision attached to petitioner's writ. Respondents submit that, even if petitioner's rendition of the facts is taken as true and the statements could be considered involuntary, any error from the admission of the statements would still be harmless, and thus would not entitle petitioner to relief.

CONCLUSION

For the foregoing reasons, respondents ask this Court for an order again denying the writ.

DATED this 28th day of April, 1989.

Respectfully submitted,

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State of Arizona

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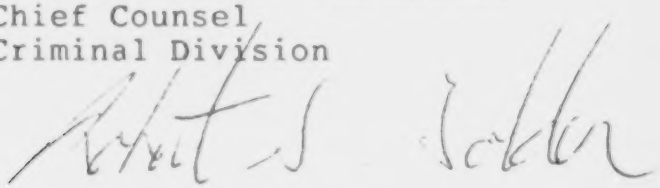

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THREE COPIES of this Response were mailed this 28th day of April, 1989, to:

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SUBSCRIBED AND SWORN to before me this 28th day of April, 1989.

Janet E. Dyer

JANET E. DYER
NOTARY PUBLIC

My Commission Expires:

December 10, 1989

HC5-134/9428d jd